# Nos. 14-1182 & 14-1220

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**PALLET COMPANIES, INC.,**
**A SUBSIDIARY OF IFCO SYSTEMS, N.A., INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| PALLET COMPANIES, INC., A SUBSIDIARY OF IFCO SYSTEMS, N.A., INC. | ) | |
| Petitioner/Cross-Respondent | ) | Nos. 14-1182, 14-1220 |
| v. | ) | |
| NATIONAL LABOR RELATIONS BOARD | ) | Board Case Nos. 04-CA-128224 et al. |
| Respondent/Cross-Petitioner | ) | |

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

### A. Parties and Amici

Pallet Companies, Inc., a Subsidiary of IFCO Systems, N.A., Inc. was the Respondent before the Board in the above-captioned case and is the Petitioner in this court proceeding. The Board's General Counsel was a party before the Board. The United Food and Commercial Workers Union, Local 1360 was the charging party before the Board.

### B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on August 27, 2014 and reported at 361 NLRB No. 33, which relies on the findings of

the Board and an administrative law judge in an earlier representation proceeding. The findings of the Board in the representation proceeding (Board Case 04-RC-093398) are contained in an unpublished Decision and Certification of Representative, which issued on April 2, 2014; the findings of the administrative law judge in the same proceeding are contained in an unpublished Administrative Law Judge's Report and Recommendations on Objections, which issued on September 30, 2013.

**C. Related Cases**

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, D.C.
this 31st day of March 2015

# TABLE OF CONTENTS

**Headings** **Page(s)**

## TABLE OF CONTENTS

**Headings – Cont'd** **Page(s)**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**



[*] Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

**Cases-Cont'd** **Page(s)**



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**Cases-Cont'd** **Page(s)**



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**Cases-Cont'd** **Page(s)**



[*] Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

**Cases-Cont'd** **Page(s)**



**Statutes:** **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

## GLOSSARY

| | |
|---|---|
| Act | The National Labor Relations Act (29 U.S.C. § 151 et seq.) |
| ALJR | Administrative Law Judge's Report and Recommendations on Objections |
| Board | The National Labor Relations Board |
| Br. | Opening brief of Petitioner Pallet Companies, Inc., a Subsidiary of IFCO Systems, N.A., Inc. |
| Company | Pallet Companies, Inc., a Subsidiary of IFCO Systems, N.A., Inc |
| D&O | The NLRB Decision and Order dated August 27, 2014 |
| DCR | The NLRB Decision and Certification of Representative dated April 2, 2014 |
| Exh. | Exhibit |
| ERX | Exhibit submitted by Company at underlying representation hearing |
| MOT | Motion for Summary Judgment filed by the NLRB General Counsel before the NLRB |
| NLRB | National Labor Relations Board |
| NSC | NLRB Notice to Show Cause |
| PX | Exhibit submitted by Union at underlying representation hearing |
| RDX | Exhibit submitted by the NLRB Regional Director at underlying representation hearing |

| | |
|---|---|
| Tr. | Transcript of underlying representation hearing |
| Union | The United Food and Commercial Workers Union, Local 1360 |

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION**
**FOR ENFORCEMENT OF AN ORDER OF**
**THE NATIONAL LABOR RELATIONS BOARD**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF JURISDICTION

This case is before the Court on the petition of Pallet Companies, Inc., a Subsidiary of IFCO Systems, N.A., Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company on August 27, 2014, and reported at 361

NLRB No. 33. (A 453-57.)[1] There, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act") by refusing to bargain with the United Food and Commercial Workers Union, Local 1360 ("the Union") as the duly certified collective-bargaining representative of the truck drivers and production employees at the Company's Burlington, New Jersey facility, and by refusing to comply with the Union's request for information relevant to collective bargaining. (A 455.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which allows an aggrieved party to obtain review of a final Board order in this Circuit, and allows the Board to cross-apply for enforcement.

As the Board's unfair-labor-practice Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 4-RC-093398) is also before the Court pursuant to Section 9(d) of

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[1] Record references in this final brief are to the Deferred Appendix ("A") filed by the Company. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Company filed its petition for review on September 18, 2014, and the Board filed its cross-application for enforcement on October 30, 2014. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

## STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its discretion in overruling the Company's election objections and certifying the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and provide the Union with requested, relevant information.

## RELEVANT STATUTORY PROVISIONS

All relevant statutory provisions are included in the addendum to the Company's brief.

## STATEMENT OF THE CASE

In this unfair-labor-practice case, the Company admittedly refused to bargain with the Union in order to seek court review of the Board's determination in the underlying representation case to overrule the Company's objections to a Board-conducted secret-ballot election and certify the Union as the employees' collective-bargaining representative. Based on its admitted refusals, the Board found (A 455) that the Company violated Section 8(a)(5) and (1) of the Act. The relevant background and details of the representation proceeding are summarized below.

### I. THE REPRESENTATION PROCEEDING

#### A. Factual Background: the Company's Operations and the Union's Organizing Campaign

The Company is involved in the collection, repair, and distribution of wooden shipping pallets. (A 327; A 442.) During the relevant time period, its customers included the United States Postal Service and Dunkin Donuts. (A 327; A 89-90.) The facility involved in this case is located in Burlington, New Jersey, where the Company employs about 50 employees, including truck drivers who transport pallets to and from the facility, nailers who repair the incoming damaged

pallets, and forklift drivers who move pallets and other materials within the facility.[2] (A 327; A 122, 126-34, 316.)

The Burlington facility processes approximately five to six thousand used pallets per day. (A 122.) Used pallets arrive at the facility by truck in stacks of 15 or 22. (A 327; A 127.) Forklift drivers remove the stacked pallets from the incoming trucks and place them on a dock. (A 327; A 85, 127-29, 131-32.) Other forklift drivers transport the stacked pallets from the dock to individual nailers for inspection and repair. (A 327; A 85, 127-29, 131-32, 252-54, 298.) To ensure efficient distribution of pallets from the dock, the Company assigns specific areas of the dock to individual forklift drivers, so that a forklift driver picks up stacks of pallets only from his assigned area, unless he is designated as one of two "floaters." (A 127-28.) The forklift drivers have no control over the condition of the pallets in a given stack on the dock; they merely pick up a stack and transport it to a nailer. (A 331; A 127, 130.) The Company's managers monitor the work of the forklift drivers to "see that no nailers are without pallets for any substantial period of time," and to ensure, as much as possible, that pallets are distributed fairly. (A 331; A 126, 129.)

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[2] The Union's representation petition referred to an additional group of employees, classified as "saw room operators," but the record does not reveal the nature of their work. (A 325.)

In October 2012, the United Food and Commercial Workers Union, Local 1360 ("the Union") began a campaign to organize the truck drivers, nailers, forklift drivers, and saw room operators employed at the Burlington facility. (A 326; A 197, 325.) The Union's Assistant Organizing Director, Edward Cecil, led the organizing campaign and served as the Union's main organizer. (A 329 n.5; A 181.) Two other union officials, Charles Van Artsdalen and Robert Hollinger, assisted Cecil. (A 329 n.5; A 101, 103, 116-17, 173-74, 185, 187.)

During the campaign, Cecil endeavored to contact each and every one of the Burlington employees, either by phone or in person, to inform them about the organizing campaign and answer any questions they had. (A 329 n.5; A 184-85.) He visited some of the employees at their homes, leaving union literature and his business card for those who were not able to speak to him. (A 329 n.5; A 184-86.) He also made himself available to employees at places they frequented outside their work hours. (A 329 n.5; A 102-03, 118, 173-74, 185.) Thus, he regularly met employees at a Wawa where they took their lunch break, and at a commuter train station that they used on their way home from work. (*Id*.) By the final stages of the campaign, Cecil was meeting employees daily at the train station, often with Hollinger and sometimes with Van Artsdalen. (A 329 n.5; A 185.)

In addition to this outreach, Cecil prepared union-related literature for the employees over the course of the campaign. (A 329 n.5; A 187, 191.) He

distributed this literature himself, along with union authorization cards, and sometimes provided these materials to pro-union employees such as Tyrone LaRocca or Mark Cunningham for further distribution. (A 329 n.5; A 174-75, 186-87, 198-99.) Some employees returned their signed authorization cards directly to Cecil when they met him at the Wawa or elsewhere; others left their signed cards with LaRocca, Cunningham, or another employee for delivery to Cecil. (*Id*.)

### B. Procedural History

On November 16, 2012, the Union filed a petition with the Board seeking certification as the collective-bargaining representative of the production employees at the Company's Burlington, New Jersey facility. (A 326; A 325.) On December 20, 2012, pursuant to a stipulated election agreement, the Board held a secret-ballot election among employees in a bargaining unit that included "[a]ll full-time and regular part-time truck drivers and production employees, including nailers, saw room operators, and fork lift drivers" at the Burlington facility. (A 326-27; A 316-20.) The tally of ballots prepared at the conclusion of the election showed that, of 49 eligible voters, 23 voted for the Union and 20 voted against it, with no challenged ballots. (A 326-27; A 316.)

Within seven days of the election, on December 27, 2012, the Company filed a timely objection to the election.[3] (A 327; A 315.) The objection alleged that an unnamed "lead organizer" for the Union had "distributed heavy narcotics to several [company] employees during the critical period [before the election,] in order to influence the outcome of the election." (*Id*.) The objection further alleged that "[a]s a direct consequence of the actions of the union's organizer, employees were unavailable to vote in the election and the outcome of the election was affected." (*Id*.)

One week later, on January 3, 2013, the Company belatedly submitted two additional objections to the election. (A 327; A 312-13, 403-410.) The first objection alleged that "[p]rior to the election pro-Union forklift drivers supplied fewer pallets, or pallets that were more difficult to repair, to 'pro-company or undecided' nailers, thereby threatening these nailers with lower earnings and coercing them to support the Union." (*Id*.) The second belated objection alleged that union supporters made threats, including a death threat, against an employee who had publicly expressed opposition to the Union. (*Id*.)

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[3] Section 102.69(a) of the Board's Rules and Regulations provides, in relevant part, that "[w]ithin 7 days after the tally of ballots has been prepared, any party may file with the Regional Director . . . objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election." 29 C.F.R. § 102.69(a).

The Board's Regional Director found that the Company's timely objection raised issues of fact warranting a hearing. (A 313.) As to the two late-filed objections, however, the Regional Director explained that a hearing was necessary to determine "whether the additional alleged pre-election misconduct should be considered notwithstanding its late submission, and if so, whether the conduct affected the results of the election." (*Id*.)

Pursuant to the Regional Director's determinations, a hearing was held on September 4, 2013. (A 326; A 40, 201.) The administrative law judge, sitting as hearing officer, interpreted Board precedent as requiring him to consider all of the evidence adduced at the hearing, regardless of whether it related to a timely objection. (A 327.) Accordingly, he issued a report addressing the merits of all three objections, and, having found each of them lacking in merit, recommended that the Board overrule them and certify the Union. (A 328-32.) Thereafter, the Company filed exceptions to portions of the judge's report and recommendations. (A 389; A 421-25.)

On review, the Board (Chairman Pearce and Members Johnson and Schiffer) issued a Decision and Certification of Representative on April 2, 2014, adopting the administrative law judge's findings and recommendations, and certifying the Union as the employees' exclusive collective-bargaining representative. (A 389-90; A 426-27.) As to the untimely objections, the Board stated that it "d[id] not

decide whether the judge should have considered related evidence." (A 390 n.3; A 427 n.3.) Nevertheless, the Board noted that the Union did not except to the judge's decision to review the two untimely objections, and found, in any event and in agreement with the judge, that the Company did not meet its burden of showing objectionable conduct that would have materially affected the election results. (*Id*.)

## II. THE UNFAIR LABOR PRACTICE PROCEEDING

On April 4, 2014, the Union requested, by letter, that the Company recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees and that the Company furnish certain information relevant to collective bargaining. (A 455; A 436, 439-40, 443.) The Company refused. (A 455; A 436, 441, 443.) Thereafter, acting on an unfair labor practice charge filed by the Union, the Regional Director issued a complaint alleging that the Company's refusals to bargain and furnish information violated Section 8(a)(5) and (1) of the Act. (A 453; A 435-38.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (A 453; A 397-402, 447.) In response, the Company admitted that it refused to bargain with and furnish information to the Union, but claimed that it had no duty to do so because the

Board had erred in overruling its election objections and certifying the Union. (A 454; A 448.)

## III. THE BOARD'S CONCLUSIONS AND ORDER

On August 27, 2014, the Board (Chairman Pearce and Members Johnson and Schiffer) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to bargain with, and provide requested information to, the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 454-55.) The Board concluded that all representation issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances, that would require the Board to reexamine its decision to certify the Union. (A 454.)

The Board's Order requires the Company to cease and desist from refusing to bargain with, and provide requested information to, the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights (29 U.S.C. § 157). (A 455.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, to furnish the information requested by the Union, and to post a remedial notice. (A 455-56.)

## SUMMARY OF ARGUMENT

The Company has admittedly refused to bargain with the Union in order to challenge the Board's certification of the Union. That challenge, however, must fail because the Board acted well within its discretion in determining that, in the underlying representation proceeding, the Company failed to meet its burden of proving that any objectionable conduct occurred that materially affected the employees' exercise of free choice when they voted in the December 20, 2012 election for the Union to become their bargaining representative.

The Company's allegations of objectionable pre-election conduct focused heavily on one employee, Tyrone LaRocca, whom the Company erroneously describes as a union agent. As the Board reasonably found in overruling the objections, the Company failed to adduce evidence at the hearing that would prove an agency relationship existed. Specifically, as the Board found, the Company failed to demonstrate, as it must, that the Union authorized LaRocca to act for it generally in the organizing campaign, or that the Union authorized LaRocca to take the specific actions that the Company alleged were objectionable. Accordingly, LaRocca's actions cannot be attributed to the Union.

The Board also acted within its discretion in determining that the Company failed to prove that LaRocca's alleged actions would warrant setting aside the Union's election victory under the Board's standard applicable to third-party

misconduct, which requires a showing that those actions were so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. As the Board's decision (A 328-32) reflects, the Company proved only that LaRocca sold drugs to one employee, and this single transaction had no relevance to the election. Although the Company claimed, in a separate objection, that LaRocca wielded his power over the internal pallet distribution process to coerce support for the Union, the Company's own General Manager refuted the premise of this objection—that LaRocca, as a forklift driver, had the power to manipulate the distribution of pallets to the detriment of specific nailers. And the Company failed to adduce any credible evidence in support of its remaining objection, that LaRocca and other employees threatened an employee who opposed union representation with death and bodily harm. Given the Company's failure to demonstrate any objectionable conduct that would warrant setting aside the election, the Board properly overruled the Company's objections and certified the Union.

## ARGUMENT

### THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS AND CERTIFYING THE UNION, AND THEREFORE PROPERLY FOUND THAT THE COMPANY'S REFUSALS TO BARGAIN OR PROVIDE INFORMATION VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." 29 U.S.C. § 158(a)(5). Here, the Company has admittedly (Br. 2, 11-12) refused to bargain with the Union in order to challenge the Board's certification of the Union following its election victory. There is no dispute that if the Board properly certified the Union as the employees' collective-bargaining representative, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union or provide the Union with the requested information,[4] and the Board is entitled to enforcement of its Order. *See C.J. Krehbiel Co. v. NLRB,* 844 F.2d 880, 881-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board abused its discretion in overruling the Company's election objections and certifying the Union. *See NLRB v. A.J. Tower Co.,* 329 U.S. 324, 329-30, 335

[4] An employer's failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

(1946); *accord Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

### A. Applicable Principles and Standard of Review

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower Co.*, 329 U.S. at 330; *accord C.J. Krehbiel Co.*, 844 F.2d at 882. There is a "strong presumption" that an election conducted in accordance with those safeguards "reflect[s] the true desires of the employees." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); *accord NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) ("the outcome of a Board-certified election [is] presumptively valid"); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (same); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (same). Therefore, the results of such an election "'should not be lightly set aside.'" *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted).

The party seeking to set aside an election bears a "heavy burden" of showing that the election results are invalid. *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *Amalgamated Clothing Workers*, 424 F.2d at 827; *see also NLRB v. Mattison Mach. Works*, 365 U.S. 123, 123-24 (1961) (per curiam). To meet that burden, the objecting party must demonstrate, not only that improprieties occurred,

but that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Amalgamated Clothing Workers*, 424 F.2d at 827 (citation omitted). This means an especially compelling showing where the election improprieties involve employee conduct, rather than the conduct of the union or the employer: the Board will not overturn the results of a representation election based on employee conduct, unless it was "'so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.'"[5] *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 264-65 (D.C. Cir. 1998) (quoting *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)).

By court-approved rule, moreover, the Board generally will not consider alleged improprieties occurring outside the "critical period" prior to the election—that is, the period beginning with the union's filing of an election petition and ending with the election. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). This Court has endorsed the Board's critical-period rule as "a convenient device to limit the inquiry period near the election when improper acts are most likely to affect the employees' freedom of choice." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984); *see also NLRB v.*

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[5] This more compelling showing is required where employee conduct is concerned because employees, as third parties to the election, generally do not have the same coercive power over potential voters as do the parties (union and employer) to the election. *See Overnite Transp.*, 140 F.3d at 264-65.

*Lawrence Typographical Union No. 570*, 376 F.2d 643, 652 (10th Cir. 1967) (recognizing that the purpose of the rule is "to eliminate from post-election consideration conduct that is too remote to have prevented the free choice guaranteed by Section 7 of the Act").

The determination whether an objecting party has carried its burden of proving objectionable conduct pursuant to the above rules is "fact-intensive" and thus "especially suited for Board review." *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999). On appeal, the Board's rulings on election objections are entitled to deference. *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1562; *Amalgamated Clothing Workers*, 424 F.2d at 827; *accord Timsco Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987). "It is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election." *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1562. Accordingly, the scope of appellate review is "extremely limited." *Id.* at 1562, 1564; *accord C.J. Krehbiel Co.*, 844 F.2d at 882.

### B. The Board Acted Well Within Its Discretion in Overruling the Company's Election Objections

In the instant case, the Board acted within its discretion in finding (A 326-32, 389-90) that the Company failed to prove its claims that an alleged union agent and pro-union employees engaged in objectionable conduct warranting a new

election. As an initial matter, the Company failed to prove that pro-union employee Tyrone LaRocca, who is implicated in each of the Company's objections, was a union agent. The Company accordingly faced, but fell far short of carrying, the heavy burden of proving that LaRocca and other pro-union employees created "a general atmosphere of fear and reprisal rendering a free election impossible." *See Overnite Transp.*, 140 F.3d at 264-65.

As shown below, the Company proved nothing more than that LaRocca sold drugs to one employee, and this single transaction had no relevance or material effect on the results of the election. The Company's General Manager refuted the Company's separate claim that LaRocca had the power to manipulate the Company's internal distribution of pallets to inflict economic harm on anti-union employees. And the Company failed to adduce any credible evidence that LaRocca and other employees made threats, including an alleged death threat, against an employee who opposed union representation. Given the Company's failure to demonstrate any objectionable conduct, the Board properly overruled the Company's objections.

It should not pass without comment that the Company in its brief to the Court attempts to present "as fact" a view of the case that is unsupported by the credited evidence and was rightly rejected by both the administrative law judge and the Board on review. Arguing under an incorrect standard of review, the

Company contends that the Board's overruling of its election objections and certification of the Union "is not supported by substantial evidence" (Br. 12, 13; *see also* Br. 15-16, passim), and that its alternative view of the facts is supported by substantial evidence. Even if that were the standard of review in this case, which it is not, the Court has repeatedly explained to parties their error in attempting to challenge Board decisions in this manner. Substantial evidence review "does not allow a court to 'supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.'" *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)). Rather, an agency decision "'may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.'" *Id*. (quoting *Robinson v. Nat'l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994)). In any event, the Company does not even attempt to show, as it must, that the Board abused its discretion in overruling the objections here, and accordingly, it has entirely missed the mark.

### 1. Contrary to the Company's Claims, Employee LaRocca Was Not a Union Agent

The Company claims (Br. 28-37), as it did before the Board, that any misconduct in which LaRocca was involved must be attributed to the Union, and judged under the relatively sensitive standard applicable to union misconduct,

because LaRocca was allegedly a union agent. *See Overnite Transp.*, 140 F.3d at 264-65 (noting that Board will set aside election based on party misconduct if it created "such an environment of tension and coercion as to have had a probable effect upon the employees' actions at the polls and to have materially affected the results of the election"). The Board reasonably rejected (A 329 n.5) this claim.

The question whether an employee is an agent of a labor organization is controlled by common-law principles of agency. *Mar-Jam Supply Co.*, 337 NLRB 337, 337 (2001); *accord Overnite Transp.*, 140 F.3d at 265-66. Under those principles, an agency relationship exists where the employee has either actual or apparent authority to act on behalf of the labor organization. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). Apparent authority "results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question." *Corner Furniture Discount Ctr., Inc.*, 339 NLRB 1122, 1122 (2003); *accord Overnite Transp.*, 140 F.3d at 266. The Company, as the party asserting the agency relationship, has the burden of proving that LaRocca had either actual or apparent authority to act for the Union in the specific conduct at issue. *See Associated Rubber Co. v. NLRB*, 296 F.3d 1055, 1060 (11th Cir. 2002); *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993); *Cornell Forge*, 339 NLRB at 733. The Board's findings as to whether the Company has met its

burden will be upheld if supported by substantial evidence. *See Overnite Transp.*, 140 F.3d at 265.

Here, the Company can point to no evidence that the Union specifically authorized LaRocca to sell drugs to fellow employees, or to threaten them, as part of the Union's organizing campaign. Indeed, Union Organizer Ed Cecil denied that he ever gave LaRocca the authority to engage in the misconduct alleged in the Company's objections.[6] (A 191.) Nevertheless, the Company maintains (Br. 28, 31-33) that the Union must be held responsible for any misconduct in which LaRocca engaged, because it gave LaRocca sufficiently broad authority in the organizing campaign to make him the Union's general agent in all dealings with the Company's employees. The Board properly rejected this argument.

LaRocca's performance of discrete tasks in the union organizing campaign—such as distributing and collecting authorization cards, distributing union hats, and serving as a union election observer—suggests that he had actual or apparent authority to perform those discrete tasks, but does not establish that he had authority to act for the Union generally. *See United Builders Supply Co.*, 287

[6] Contrary to the Company's suggestion (Br. 7), there is no evidence that Cecil "used" LaRocca to promote drug addiction as a campaign tool, knowing full well that he "dabbled in drugs." Cecil testified that he had no knowledge of any drug-dealing in which LaRocca may have been involved. (A 193.) Instead, given his knowledge that "a lot" of the Company's employees used drugs, Cecil merely considered it "safe to assume" that LaRocca had similarly "dabbled in the past." (A 192-93.)

NLRB 1364, 1365, 1373 (1988) (finding that employee was not a general agent of union where he solicited and collected union authorization cards, including from other employee solicitors, set up meetings for the Union, and served as union election observer); *see also Cambridge Wire Cloth Co.*, 256 NLRB 1135, 1139 (1981) (finding that status as a general agent is not shown by service as an election observer, or distribution and collection of union authorization cards), *enforced mem.*, 679 F.2d 885 (4th Cir. 1982).

Likewise, LaRocca's status as a general agent is not shown by the fact that he occasionally passed information between the Union's paid organizers and employees. LaRocca was one of five or six "key" employee union supporters who communicated regularly with Cecil about the organizing campaign. (A 182-83.) Cecil asked key supporters to educate fellow employees about their legal rights to organize and bargain collectively under the Act, and what they could expect in the election process. (*Id*.) However, key supporters were to go no further than passing on this publicly available information. (A 183, 185-86.) Thus, Cecil never authorized LaRocca or any other key supporter to answer questions about the Union. (A 116, 183, 185-86.) And there is no evidence that LaRocca ever spoke at union-sponsored meetings or to individual employees about the Union's position on any matter. *Cf. Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827, 828 (1984) (employees were union agents where they were permitted to speak on

behalf of the union at meetings that the union held for employees, and where one of them "spoke to a fellow employee about the [union's] initiation fees and dues, allegedly as a [union] representative").

Nor is this a case in which paid union representatives were largely absent from the campaign, leaving LaRocca to serve as the main conduit of information between the Union and employees. As shown above pp. 6-7, Union Organizer Cecil was a regular presence among the employees, often meeting them near the facility during their lunch break or at a train station that many of them used after work. Cecil was usually in the company of one or two other paid union organizers, and they would visit employees at their homes or drive them home, in an effort to directly communicate the Union's message to individual employees. The organizers also directly solicited and collected authorization cards from employees.

LaRocca was sometimes present on these regular occasions when Cecil and other organizers directly interacted with employees. (A 185.) But there is no evidence that, when LaRocca was present, Cecil permitted him to speak on behalf of the Union or present himself as a union representative.[7] Rather, at all times,

[7] As further explained below pp. 29-34, the evidence does not support the Company's claim (Br. 31) that LaRocca coerced nailer Sean Varlow in Cecil's presence, by suggesting that he could bring Varlow more pallets at work and boost his productivity-based pay. In any event, even if LaRocca's suggestion were interpreted as coercive, it did not concern any matter over which the Union had control. LaRocca spoke in his capacity as a forklift driver, about what he might do

Cecil encouraged employees to communicate directly with him if they had any questions about the Union, and he distributed his business cards to employees for this purpose. In these circumstances, where, as the Board found (A 329 n.5) "many employees had direct access to and contact with Ed Cecil . . . as well as other union representatives," employees would not have reasonably believed that LaRocca was the Union's spokesperson or had general authority to act for the Union.

In any event, as this Court has recognized, for there to be apparent authority, it is not enough for employees to believe that an individual acts on behalf of the Union.[8] *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 266 (D.C. Cir. 1998). "[I]n addition, either the [union] principal must intend to cause the [employee] to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such a belief." *Id.* Here, as shown above, the evidence fails to establish any affirmative conduct by the Union that would reasonably have created the impression among employees that LaRocca was authorized to act for the Union

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for Varlow in the context of their work. His statement, therefore, provides no evidence of his supposed authority to speak for the Union.

[8] Thus, the mere fact (*see* Br. 50 n.2) that some employees may have believed that LaRocca was a union agent is not dispositive of his status. *See Overnite Transp.*, 140 F.3d at 264, 266 (finding that "while it may be the case that several employees did in fact believe that [pro-union] employee McConley acted on behalf of the union, the union cannot be held responsible for his conduct because it did nothing to confer apparent authority on him").

generally. *Cf. Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 824 (D.C. Cir. 2001) (employer clothed a subset of its employees with apparent authority by requiring them to sign a pledge of support that became known to other employees); *NLRB v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC, Local 745*, 759 F.2d 533, 534 (6th Cir. 1985) (union clothed employee stewards with apparent authority by publishing a policy specifically referencing their role).

Notwithstanding the Board's reasonable finding (A 329 n.5) that LaRocca was not a general agent of the Union, the Company insists (Br. 30, 32, 37) that LaRocca's status as a general agent is "decide[d]" by *Bellagio, LLC*, 359 NLRB No. 128 (2013).[9] In that case, the union permitted a *non-employee* to participate in union-sponsored meetings, and thus reasonably created the impression among employees that the non-employee was present as a union representative. There are no such facts in this case. LaRocca was not an outsider whose mere presence with union officials would have created the impression that he was one of them. Rather, he was a union activist among the employees, and the Union did not do anything to identify him—either actually or apparently—as anything more than that.

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[9] The *Bellagio* decision was issued by a Board panel that included Members Richard F. Griffin and Sharon Block. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Griffin and Block.

As the Company failed to prove that LaRocca was a general agent of the Union, any misconduct in which he engaged was that of a third-party to the election. Moreover, third-party misconduct cannot justify setting aside the results of a Board-conducted election, unless it is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Overnite Transp.*, 140 F.3d at 265. Here, as shown below, the Board had no occasion to apply this demanding legal standard, because the Company failed to make even a basic factual showing of critical-period misconduct that affected the outcome of the election.

### 2. The Company Did Not Prove Its Objection Alleging That LaRocca Affected the Outcome of the Election by Selling Drugs to Employees

The Company's first objection alleged that LaRocca distributed drugs to "several" employees "during the critical period" before the election, and as a result "employees were unavailable to vote in the election and the outcome of the election was affected." (A 312-13.) But the Company's supporting evidence established only that LaRocca sold drugs to one employee—Rios—during the critical period between the Union's filing of the representation petition on November 16, 2012, and the election on December 20, 2012. (A 328-29; A 263-64.) And, as the Board found, even "[a]ssuming Rios would have voted against union representation"—a fact not in evidence—"the Union would have still

prevailed 23-21" in the election. Thus, the Board correctly concluded that the Company failed to meet its fundamental burden of proving conduct that materially affected the results of the election. *See Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970) (objecting party must produce "specific evidence" that "the acts complained of interfered with employees' exercise of free choice to such an extent that they materially affected the results of the election"); *see also NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 805-06 (7th Cir. 2005) (holding that employer failed to establish conduct materially affecting election, because shift of allegedly affected votes could not have changed outcome, and noting that, as a "general rule . . . even when the union itself engages in prohibited conduct, the courts typically look to the bottom line of the election in determining whether to uphold the results of the election").

The Company argues (Br. 50) that, in reaching this conclusion, the Board improperly discounted evidence suggesting that LaRocca sold drugs to a second employee, Kristofer Coltenback, "during the Union's campaign." This argument is meritless. As the Board noted (A 328), "there is no evidence as to when" LaRocca may have sold drugs to Coltenback. The evidence to which the Company refers consists entirely of Rios's testimony that he had seen a drug transaction between LaRocca and Coltenback at an unspecified time. (A 263-64.) Yet, the Company speculates that the transaction Rios saw "almost certainly occurred during the

Union's campaign," given that Coltenback was hired "in or around September 2012," and the Union campaign began one month later. Leaving aside the questionable logic of the Company's assertion, it is not enough for the Company to prove that LaRocca sold drugs to Coltenback at some unspecified point during the course of the Union's three-month organizing campaign. Rather, the Company's burden is to prove that LaRocca engaged in the alleged misconduct during the approximately one-month "critical period" before the election. And here, the Company utterly failed to meet its burden of proof.

In any event, even if the Company had succeeded in establishing that LaRocca sold drugs to Coltenback during the critical period, this additional conduct would not have affected the outcome of the election as claimed in the Company's objection. Assuming Coltenback would have voted against union representation—again, a fact not supported by the credited evidence—the Union still would have prevailed in the election by a vote of 23 to 22. Thus, even accepting the Company's dubious factual claims, the objection based on LaRocca's drug-dealing still fails for lack of evidentiary support. The Board therefore properly acted in its discretion to overrule the objection.

### 3. The Company Did Not Prove Its Objection That Pro-Union Forklift Drivers Manipulated the Pallet Distribution Process To Threaten Nailers With Lower Earnings If They Did Not Support the Union

In its second objection, the Company alleged that "[p]rior to the election pro-Union forklift drivers supplied fewer pallets, or pallets that were more difficult to repair, to 'pro-company or undecided' nailers, thereby threatening these nailers with lower earnings and coercing them to support the Union." (A 312-13.) At this stage in the proceedings, the Company no longer presses any claim of actual discrimination in the distribution of pallets, but maintains (Br. 38-42, 44-45) that pro-Union forklift drivers used their "ability to influence the quality and quantity of pallets" nailers received to threaten them with economic harm and coerce them into supporting the Union. The Board properly found (A 331) that the Company failed to prove the premise of its claims: that the forklift drivers have power over the quality and quantity of pallets individual nailers receive. As the Board found, "there is no evidence that the forklift driver can be selective in choosing a stack to transport to the nailer." (*Id*.)

The Company's evidence supporting its claim consists mainly of testimony provided by Sean Varlow, a nailer. (A 331; A 83-108.) Varlow testified that, in addition to an hourly wage, nailers are paid a piece-rate of $0.30 for every pallet they repair, making their productivity important to their earnings. (A 87.) Varlow further testified that the forklift drivers determine which nailers get the "good"

pallets that can be quickly repaired, and which nailers get the "bad" ones that are more time-consuming to repair. (A 88-89.) According to Varlow, the forklift drivers typically give most of the good pallets to their buddies, and in the days before the election, Varlow raised his need for good pallets with pro-Union forklift driver LaRocca. (A 87-89, 92.) LaRocca responded, "you work with me, I'll work with you." (Tr. 53.) Varlow interpreted this comment to mean that LaRocca would bring him "the better stacks" of pallets, so that his final count of pallets processed would be high. (A 93.)

However, notwithstanding Varlow's interpretation of what LaRocca's vague words meant, and his overall impression of how the pallet-allocation process worked, the Company's own management witness refuted Varlow's views of the process. General Manager Gary Cooper testified that several managers oversee the day-to-day work of the forklift drivers in relation to the nailers, making any manipulation of the process as described by Varlow highly unlikely, if not impossible. According to Cooper, the managers at the Burlington facility are attentive to work distribution, such as a nailer who appears to be without pallets to repair. (A 122.) Thus, as the Board noted (A 331), "Cooper testified that if he sees a nailer out of pallets he directs a forklift operator to that nailer," and "[o]ther managers would do the same thing." (*Id.*) Additionally, Cooper testified that the plant's assistant manager, Edrick Colzie, is responsible for assuring "that no nailer

is without pallets for any substantial period of time and to see, to the best of his ability, that pallets are distributed fairly." (A 331; A 129.) Given these admitted facts about the Company's operations, the Company cannot claim that the forklift drivers could manipulate the pallet-distribution process.

Likewise, the Company failed to prove (Br. 39) that readily identifiable "good pallets" exist and forklift drivers can wander the docks to find them. The Company relies on Varlow's testimony that there are "stacks of easily-repaired pallets from Dunkin Donuts contain[ing] a specific kind of pallet called a 'blue CHEP' pallet," which "make[s] th[o]se minimally-damaged pallets easily identifiable." (A 89.) However, the record does not establish that such uniformly "good" stacks exist. As the Board noted (A 332), nailer John Rios testified that "whether a nailer gets good or bad pallets is 'like rolling dice, you never know what you're going to get in a pile.'" (A 255-56.) Similarly, General Manager Cooper testified that a forklift driver cannot control the quality of pallets in a given stack. (A 130.)

In any event, even if such easily identifiable "good" stacks exist as the Company claims (Br. 39), that fact alone proves nothing about the forklift drivers' ability to secure those stacks for specific nailers. And, indeed, the testimony of Cooper undercuts any theory that the forklift drivers have such "discretion" (Br. 40). Cooper testified that most of the forklift drivers who transport pallets from the

dock to the nailers must draw their supply of pallets from a previously assigned area of the dock. Thus, contrary to the Company's suggestion (Br. 39-40), forklift drivers generally are not free to range over the entire dock looking for "good" or easily repaired stacks of pallets originating from specific customers like Dunkin' Donuts. Rather, the forklift drivers are limited to the stacks of pallets available in their respective assigned areas, and there is no evidence that the forklift drivers have any control over which stacks of pallets, from which customers, happen to be located there. The forklift driver's role, accordingly, is a limited one that involves little discretion or opportunity to manipulate the process: the forklift driver pulls stacks of pallets from his assigned area, which may or may not include stacks of perceived good quality, and transports them to the nailers.

Despite this specific management testimony undercutting the Company's objection, the Company suggests (Br. 41) that the discredited testimony of nailer Luis Mercado proves "the forklift drivers' influence over the nailers." But even if Mercado's testimony were deemed credible, it does not supply the specific evidence that the Company needs to prove its coercion claim—that is, evidence that the forklift drivers "have the ability to distribute pallets in a discriminatory manner if they choose to do so." (Br. 40.) Mercado testified only to his *belief* that the pro-Union forklift drivers were giving him and fellow nailer Varlow fewer or worse pallets than they gave others, because Mercado and Varlow were known to

be pro-company. (A 223.) He offered no explanation as to how the forklift drivers could have achieved the discriminatory objective he attributed to them. The Company's reliance on Mercado's testimony, therefore, is entirely misplaced.

Likewise, there is no merit to the Company's argument (Br. 42-44) that an adverse inference is warranted because the Union failed "to rebut Varlow's account of LaRocca's threat in the car during the week leading up to the election." The Company failed to establish that LaRocca, as a forklift driver, had the power necessary to coerce or threaten Varlow—whether by statements or otherwise. Accordingly, the Union had good reason not to bother with any rebuttal as to what LaRocca may have said. In such circumstances, there is no basis for an adverse inference. *See Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 267 n.1 (D.C. Cir. 1998) (upholding Board's decision not to draw adverse inference from union's failure to present rebuttal evidence, where union had good reason to believe that employer had failed to meet its burden of proof).

In sum, the Company failed to prove its claim (Br. 40) that forklift drivers like LaRocca "have the ability to distribute pallets in a discriminatory manner if they choose to do so." As a consequence, any statements LaRocca may have made in reliance on this non-existent power were completely vacuous and could not have amounted to coercive conduct as the Company claims. *See, e.g., Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003) (threats of job loss for not supporting the union,

made by one rank-and-file employee to another, not objectionable because readily evaluated as beyond the control of employees and union); *accord Pac Tell Group, Inc.*, 2014 WL 4714081, *1 n.1 (2014). The Board, thus, properly overruled the Company's objection alleging coercion in regard to the distribution of pallets.

#### 4. The Company's Objection that Employee Union Supporters Made Death Threats Against an Employee Who Publicly Opposed the Union Is Baseless

In its third and final objection, the Company alleged that pro-union employees threatened to physically harm a vocal opponent of the Union in the days before the election, including by threatening him with death in front of 20 to 25 other employees. The Company, however, was unable to present credible evidence of any such threats. (A 329-31.) Indeed, the Company elicited no testimony at all from the assertedly numerous bystanders who witnessed the alleged death threat. (A 330.) In these circumstances, the Board properly overruled (A 331) the Company's baseless objection that serious, disseminated threats tainted the election.

As the Board found (A 329), the only evidence supporting the Company's threat claims is the discredited, "uncorroborated[,] and contradicted" testimony of Stephen Diamond. Diamond gave an anti-union speech to a group of 20 to 25 fellow employees in a company lunchroom on December 18, 2012. (A 329; A 58-61, 155-61.) According to Diamond, within 10 seconds of his starting to talk, he

was "shouted down by two other people in the room," employees Keith Little and Rudy Curvy. (A 329; A 58-61.) Diamond testified that Little accused him of being "paid by the company to say this," and Curvy "chimed in" and said essentially the same thing. (A 329; A 60-61.) Diamond recalled that the two would not stop shouting, and would not calm down, resulting in a two- to three-minute "episode" that prevented Diamond from speaking. (A 61-62.)

According to Diamond, he received a series of threats soon after this episode—first from Little, then from Curvy, and finally from LaRocca. (A 330; A 62-66, 76.) Each of them purportedly warned him to "watch his back," and Curvy purportedly threatened to kill him in the presence of 20 to 25 other employees gathered to begin the workday on December 19, 2012.[10] (*Id*.)

Given the highly public nature of the lunchroom confrontation and subsequent death threat described by Diamond, the Board's administrative law judge reasonably observed (A 330) that "one would expect that the [Company] would be able to corroborate Diamond's account" of those two incidents, at least. However, the Company adduced no corroborating testimony whatsoever, and did

[10] Diamond additionally testified that, shortly after the last of these threats, he found an unsigned note on the front seat of his truck, threatening him with death. (A 330; A 65.) Diamond was unable to identify the handwriting on the note, and he did not save it. (A 65-66.) The Company does not press any claim that Diamond's unsupported testimony as to this anonymous conduct provides a basis for setting aside the election.

not even question its employee witnesses about the events Diamond described. The judge reasonably found (A 330) the resulting absence of corroboration "significant," because the Company had "made a concerted effort after the tally of ballots to solicit evidence of union misconduct," and there were plenty of opponents to union representation among the employees, who presumably would have testified to the alleged targeting of Diamond for his anti-Union views.

Further casting doubt on Diamond's account, as the judge found (A 330-31), is the fact that what testimony there is in the record tends to contradict Diamond's version of key events. Specifically, employee Little flatly denied that he had accused Diamond of being paid by the Company when Diamond made his anti-Union speech in the lunchroom, and likewise denied telling Diamond to watch his back thereafter. (A 159-60.) Moreover, contrary to Diamond's testimony (A 60-62) that Little and Curvy immediately interrupted his lunchroom speech and engaged in a two- to three-minute shouting "episode" that prevented him from expressing his opinions, Little testified (A 158-61) that he allowed Diamond to speak his mind for about five minutes and only then interjected—without the audible support of anyone else in the room—that he could not believe what Diamond was saying. (A 158-60.) Little further testified that he left the lunchroom after making his comment, that Diamond then resumed his speech, and that no one else interrupted Diamond while he was in the room. (A 159-60.) Thus,

Little's testimony is in direct tension with Diamond's claim that Curvy joined with Little in shouting and preventing Diamond from speaking for a period of minutes.

As the Board found (A 330-31), Diamond's suspiciously uncorroborated and contradicted testimony also lacks basic plausibility when considered on its own terms. Diamond testified that the threats he received made him fearful because he knew that a number of his fellow employees had criminal backgrounds, and yet he was inexplicably able to "laugh[] [the threats] off" in the moment, and he made no effort at all toward self-preservation. (A 62-63, 70.) On the contrary, Diamond testified that when Curvy said to him, "If I get you outside of here I'm going to kill you," he offered to go outside immediately, and it was Curvy—the aggressor who was allegedly prepared to kill Diamond—who inexplicably declined to follow Diamond outside. (A 63.) In the wake of this and other incidents, Diamond never took the initiative to report the purportedly serious threats he had received to company officials, despite daily interactions with managers in which they would specifically invite him to express if anything was wrong. (A 330; A 68-69.) Moreover, there is no evidence that Diamond reported the death threat to the police or even discussed it with anyone soon after it occurred. He ultimately provided information about the threats only in response to questions from a company labor consultant, weeks after the threats allegedly took place. (A 330; A 67-68.)

In light of Diamond's failure to take any actions consistent with the purported seriousness of the threats he received, as well as the lack of corroborating testimony and the contradictory testimony provided by Little, the judge reasonably discredited Diamond's account of the alleged threats. Although the Company now suggests (Br. 21-23) that the Court should parse Diamond's discredited testimony and accept those aspects of it that were not specifically controverted by Little, there is no basis for the Court to disregard the administrative law judge's overall credibility determination in this manner.

This Court applies a "highly deferential standard" in reviewing an administrative fact-finder's credibility determinations. *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1092 (D.C. Cir. 2012). "An ALJ's determinations regarding the credibility of witnesses will not be reversed unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation marks and citation omitted); *accord Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1124 (D.C. Cir. 2012) (upholding credibility determinations made by hearing officer in post-election-objections proceeding, and adopted by Board, because employer failed to show that they were hopelessly incredible, self-contradictory, or patently unsupportable). Here, the Company has

not approached the showing necessary to overturn the judge's determination that Diamond's testimony as to the alleged threats was incredible.

Contrary to the Company (Br. 23-24), the judge was not obliged to accept Diamond's implausible testimony, despite the lack of corroboration, on the theory that the Union could have rebutted the testimony if it were not true. Such an approach would improperly reverse the burden of proof in this proceeding. It is the Company's burden to prove its allegations of objectionable conduct by persuasive evidence, not the Union's burden to disprove any suggestion of misconduct. Accordingly, it was entirely reasonable and within the judge's discretion as a fact-finder to consider the absence of company witnesses to corroborate Diamond's account as one factor undercutting Diamond's credibility, given the purported abundance of witnesses for some of the events Diamond described.

Similarly, the judge was not obliged to rationalize Diamond's inaction in the face of death threats as possibly based on a fear of retaliation. Although the Company speculates (Br. 24) that immediately reporting a death threat to management "could put the threatened employee at risk of retaliation," given the criminal histories of some of the employees, Diamond did not explain his inaction by reference to any such fear. Rather, he testified that he did not report the threats to management because he was concerned for the job security of the very people who had threatened him with death and bodily harm. (A 74-75.) In these

circumstances, the judge was well within his rights to consider Diamond's incongruous reaction to the death threats he received as yet another factor undercutting his credibility.

Likewise, it was entirely reasonable for the judge to base his credibility determination, in part, on obvious inconsistencies between Diamond's account of relevant events and Little's account of those same events. Contrary to the Company's argument here (Br. 26), Little's credited testimony is sharply at odds with Diamond's testimony, as explained above pp. 36-37, and the tension cannot be explained away as the Company briefly suggests (Br. 26).

In short, the Company's efforts to salvage Diamond's credibility "surely do not demonstrate that the Board's contrary determinations . . . are 'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable' as [this Court's] cases require." *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 221 (D.C. Cir. 2005). There is, accordingly, no basis for the Court to overturn the judge's reasonable determination that Diamond's testimony as to the alleged threats was not credible.

As the Board emphasized (A 331), "the [Company] has the burden of proving that the objectionable conduct of which it complains[] in fact occurred." Here, the Company utterly failed to meet this burden by presenting credible

evidence of the claimed threats. Therefore, the Board properly overruled the Company's threat objection for lack of evidentiary support.

### C. There is No Reason for the Court To Consider the Company's Claim of Cumulative Impact

In the absence of any proven coercive conduct, there is no basis for the Company's claim (Br. 51-52) that "the coercive conduct must be considered in the aggregate" to determine whether the election should be set aside. As this Court has recognized, although the Board "'consider[s] the overall conduct of an election campaign, . . . such an approach may not be used to turn a number of insubstantial objections to an election into a serious challenge.'" *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1569 (D.C. Cir. 1984) (quoting *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 764-65 (8th Cir. 1980)).

Here, as shown above, the Board properly found that the Company's objections lacked basic factual support. In these circumstances, the objections cannot warrant setting aside the election, even if considered cumulatively. *See NLRB v. Brown-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 349-50 (7th Cir. 1986) ("[t]he challenging party must at the very least demonstrate conduct that is legally actionable in its component parts or 'offer the Board detailed evidence of the pattern the activity formed and its influence on the election'") (quoting *Melrose-Wakefield Hosp. Ass'n v. NLRB*, 615 F.2d 563, 570 (1st Cir. 1980)); *see also Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1570 (holding

that the Court "will not independently assess the 'totality of the circumstances' to overturn the Board's considered decisions").

## CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| PALLET COMPANIES, INC., A SUBSIDIARY OF IFCO SYSTEMS, N.A., INC. | ) | |
| Petitioner/Cross-Respondent | ) | Nos. 14-1182, 14-1220 |
| v. | ) | |
| NATIONAL LABOR RELATIONS BOARD | ) | Board Case Nos. 04-CA-128224 et al. |
| Respondent/Cross-Petitioner | ) | |

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 9,764 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 31st day of March 2015

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|---|---|---|
| PALLET COMPANIES, INC., A SUBSIDIARY OF IFCO SYSTEMS, N.A., INC. | ) | |
| Petitioner/Cross-Respondent | ) | Nos. 14-1182, 14-1220 |
| v. | ) | |
| NATIONAL LABOR RELATIONS BOARD | ) | Board Case Nos. 04-CA-128224 et al. |
| Respondent/Cross-Petitioner | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2015, I electronically filed the foregoing Final Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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